Ang Siok Hong v Tan Geok Kwi

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–13 OF 1998
SURIYADI J
29 OCTOBER 1998

Civil Procedure *— Appeal — Application to restore — Plaintiff filed notice of appeal — Notice of appeal struck out as plaintiff's counsel did not appear — Not struck out on merits — Whether court could exercise discretion to restore appeal — Whether action was res judicata in view of decision in another action between the parties*

The plaintiff had filed a writ of summons and the defendant had, in turn, filed a summons in chambers to strike out the writ. The senior assistant registrar who heard the defendant's application granted an order in terms of the application. The plaintiff immediately filed a notice of appeal and the plaintiff's solicitor appointed a Mr Ravi Muthiah to act as counsel on his behalf regarding the appeal. The notice of appeal, however, had been struck out by the court as no one had appeared, including Mr Ravi. In fact, the notice and the hearing date of the appeal had not been despatched to Mr Ravi. The plaintiff then applied for the restoration of the appeal.

The court considered the relevant facts relied on by the senior assistant registrar when striking out the present action. Previously, the defendant in the present action had, in another case, obtained a summary judgment against the plaintiff. The current plaintiff, being dissatisfied, filed an appeal before the High Court. Before the summary judgment appeal could be heard, the defendant applied to strike out this action on the ground of res judicata which the senior assistant registrar allowed.

Held, allowing the plaintiff's application:

(1) The senior assistant registrar, prior to the High Court allowing the summary judgment appeal, struck out the present action relying on the defendant's argument that the matter in the action was res judicata as summary judgment had already been obtained. Had the present action been heard after the decision of the summary judgment appeal, in all probability the senior assistant registrar would not have granted the striking out application based on res judicata. The court therefore permitted the application to reinstate the notice of appeal (see p 254E–H).

(2) A court still has the power to act and be within its jurisdiction provided it has merely struck out the case without considering the merits. In the present situation, since the court had dismissed the notice of appeal offhandedly, it could thereby exercise its discretion to restore the notice of appeal (see p 257D–E).

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu writ saman dan defendan pula telah memfailkan saman dalam kamar untuk membatalkan writ. Penolong kanan pendaftar yang telah mendengar permohonan defendan membenarkan perintah seperti yang dikehendaki oleh permohonan. Plaintif memfailkan notis rayuan dengan segera dan peguamcara plaintif melantik seorang bernama En Ravi Muthiah untuk bertindak sebagai peguambela bagi pihaknya berhubung dengan rayuan tersebut. Walau bagaimanapun, notis rayuan telah dibatalkan oleh mahkamah kerana tiada sesiapa telah hadir, termasuk En Ravi. Pada hakikatnya, notis dan tarikh pembicaraan rayuan tidak dimaklumkan kepada En Ravi. Plaintif kemudiannya telah memohon untuk pengembalian rayuan.

Mahkamah telah mempertimbangkan fakta-fakta yang relevan yang telah digunakan oleh penolong kanan pendaftar sewaktu membatalkan tindakan ini. Sebelum ini, defendan dalam tindakan ini, dalam satu lagi kes yang lain, telah memperolehi penghakiman terus terhadap plaintif. Plaintif ini, yang tidak puas hati, memfailkan rayuan di hadapan Mahkamah Tinggi. Sebelum rayuan penghakiman terus dapat didengar, defendan memohon supaya tindakan ini dibatalkan atas alasan res judicata yang dibenarkan oleh penolong kanan pendaftar.

Diputuskan, membenarkan permohonan plaintif:

(1) Penolong kanan pendaftar, sebelum rayuan penghakiman terus dibenarkan oleh Mahkamah Tinggi, telah membatalkan permohonan ini dengan bergantung pada hujah defendan bahawa perkara dalam tindakan tersebut adalah res judicata oleh kerana penghakiman terus telah pun diperolehi. Andainya tindakan ini telah didengar selepas keputusan rayuan penghakiman terus, dalam semua kemungkinan penolong kanan pendaftar tidak akan membenarkan permohonan pembatalan berdasarkan res judicata. Maka mahkamah membenarkan permohonan untuk mengembalikan notis rayuan (lihat ms 254E–H).

(2) Sesebuah mahkamah masih mempunyai kuasa untuk bertindak dan terlingkung dalam bidang kuasanya asalkan ia hanya membatalkan kes tanpa menimbang meritnya. Dalam kes ini, memandangkan mahkamah telah menolak notis rayuan begitu sahaja, dengan itu ia boleh melaksanakan budi bicaranya untuk mengembalikan notis rayuan (lihat ms 254D–E).]

Notes

For a case on application to restore appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 445.

Cases referred to

Allum & Anor v Dickinson (1882) 2 QBD 632 (refd)
Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors [1996] 5 MLJ 51 (refd)
Gan Kim Kiat & Bros Realty Sdn Bhd v Leang Ah Kan [1983] 1 MLJ 351 (refd)
Hession v Jones [1914] 2 KB 421 (refd)
Ho Yoke Kwei & Anor v Ong Eng Hin [1997] 4 MLJ 292 (refd)
Hong Leong Finance Bhd v Robin Woon Kim Yam & Anor (Civil Suit No 22–131 of 1989) (High Court , Malacca) (refd)
Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee) [1990] 1 MLJ 44 (refd)
Maybank Finance Bhd v Sharp Trillion (M) Sdn Bhd & Ors (Guaman Sivil No 22–85, 86, 87 & 88 tahun 1997) (Mahkamah Tinggi Melaka) (refd)
Morris, Re; ex p Streeter (1881) 19 Ch D 216 (refd)
Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors [1992] 1 MLJ 73 (refd)
Walker & Ors v Budden (1879) 5 QBD 267 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68
Rules of the High Court 1980 O 18 r 9, O 32 r 5(4), O 35 r 1, O 56 rr 1, 2, O 92 r 4
Subordinate Courts Rules 1980 O 26A

Azad Bashir (*Bashir & Co*) for the plaintiff.
HS Chew (*HS Chew & Co*) for defendant.

Suriyadi J: On 19 February 1998, the plaintiff filed a writ of summons. On 1 April 1998, the defendant filed a summons in chambers pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to strike out that writ of summons. On 2 June 1998, the learned senior assistant registrar granted an order in terms to that application. On 5 June 1998, the plaintiff immediately filed in a notice of appeal. Three days later, on 8 June 1998, the plaintiff's solicitor contacted one Mr Ravi Muthiah to act as counsel on his behalf to deal with the appeal before the High Court judge. Mr Ravi was requested to act as counsel as he had earlier acted on behalf of the plaintiff at the senior assistant registrar stage.

On 18 June 1998, the plaintiff's solicitor, having obtained the sealed copy of the notice of appeal together with the hearing date of the appeal, handed these documents over to the defendant's solicitors. Simultaneously, Mr Azad, the plaintiff's solicitor, prepared a letter to be despatched to Messrs Ravi & Co together with those documents mentioned above. Being satisfied that everything was administratively in order, Mr Azad left matters as it stood until he was startled by the information that the notice of appeal had been struck out by me. I had struck out the notice of appeal on

28 August 1998 as no one had appeared including the above-mentioned Mr Ravi. The plaintiff, pursuant to encl 34, filed for the restoration of the appeal. A

Retracing our steps on receipt of that unpleasant information, Mr Azad subsequently perused his office file and discovered that the sealed notice of appeal together with the hearing date had not been despatched to Mr Ravi. Mr Azad, not unexpectedly, apologized profusely and submitted that it was not intentional on his part to be absent in court on that date, or in any way a reflection of him being disrespectful to the court. In fact, on that very day, he was in the Kuala Lumpur High Court handling two cases namely D2–22–389–98 and D2–22–272–98. B

It would have been an easy matter for me to summarily dismiss this application of reinstatement as courts generally do not sympathize with lawyers who do not have their houses in order or possess the courage to own up and accept responsibility. What struck and persuaded me to acquiesce to the reinstatement application were the relevant facts substantially relied on by the senior assistant registrar when striking out the action. She was informed that an action had been filed earlier on 19 February 1998 in the magistrate's court by the defendant of this current case, wherein there he was the plaintiff. The case down below at the magistrates court bore the reference number of 72–454–97. The current defendant had managed to obtain judgment against the plaintiff in a summary application on 12 December 1997, pursuant to O 26A of the Subordinate Courts Rules 1980. The defendant there (plaintiff in the current case), being dissatisfied with the summary judgment, had filed an appeal before High Court No 2. Before the summary judgment appeal could be heard, the defendant applied to strike out this current action of GS 22–13–1998 before the senior assistant registrar. The defendant vehemently alleged that the matter was res judicata as summary judgment had already been obtained. It would appear that that was the main ground relied by the senior assistant registrar to strike out the current matter. Six days later, ie on 12 June 1998, High Court No 2 allowed the summary judgment appeal and ordered it to proceed for full trial. Had GS 22–13–1998 been heard after the decision of this appeal, in all probability the senior assistant registrar would not have granted the striking out application, based on the concept of res judicata. On hind sight, the learned senior assistant registrar should not have proceeded with the hearing of striking out but instead wait for the outcome of the summary judgment appeal. All that was required was six days of patience. As it were, a rather strange situation arose, whereby, had the outcome of the appeal been predicted before her, that fact would have created a rolling back effect, thus neutralizing and causing the res judicata argument to crumble. It was due to those circumstances that I permitted the application to reinstate the notice of appeal. C D E F G H

To deal with the application at hand, it was necessary for me at the outset to overcome the first hurdle, ie to identify the relevant provisions applicable to a restoration application pursuant to a striking out of a notice of appeal by a judge in chambers by reason of the appellant not being present. For the sake of discussion, I found the following provisions relevant, namely: I

(1) O 32 r 5(4) of the RHC, where a court may restore an application made by summons in chambers that has been dismissed without hearing, by reason of the failure of the party who took up the summons to attend the hearing;

(2) O 35 r 1 of the RHC, for proceedings at a trial where a court may strike out an action by reason of neither party appearing. At the outset, I have to eliminate this provision as a cursory perusal of it convinced me that this provision is inapplicable for the matter at hand;

(3) O 56 r 2 of the RHC; and

(4) O 92 r 4 of the RHC, whereby nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice.

In the event of a matter having been heard before the senior assistant registrar, meaning a decision based on the merits of the case, an appeal shall lie to a judge in chambers from that judgment, order or decision. That scenario is covered by O 56 r 1 of the RHC. A notch forward is a situation where a judge in chambers having considered the merit of the case and having pronounced any judgment, order or decision, will be subject to O 56 r 2 of the RHC if an appeal has been filed. Thenceforth, the provision of s 68 of the Courts of Judicature Act 1964 and all its elements will take precedence. These provisions of O 56 rr 1 and 2 of the RHC clearly apply to actions pursuant to summons or matters that relate to actions that have been decided on merit by the registrar or the judge (*Delcont (M) Sdn Bhd v Motor Sport International Ltd & Ors* [1996] 5 MLJ 51). As I did not apply my mind or consider the merits of the case when I struck it out, O 56 r 2 of the RHC is thus inapplicable. Scrutinizing these relevant provisions, a difference of format is detected, also in that in every summons in chambers matter, the format is as per Form 62. As to the appeal papers filed by the aggrieved party pursuant to a senior assistant registrar's decision for the matter to be reheard before a judge in chambers, the format is a notice of appeal in Form 114. On that premise, O 32 r 5(4) of the RHC would be inapplicable pursuant to the appeal by the plaintiff, as the preconditions and ingredients required by O 56 r 2 of the RHC are inconsistent with the former provision. For easy reference, I reproduce O 32 r 5(4) of the RHC which reads:

> Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list.

To round up the matters discussed above, it is safe to conclude that O 32 r 5(4), O 56 r 2 and O 35 r 1 of the RHC are inapplicable for the matter at hand.

In *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors* [1992] 1 MLJ 73, the appellant was not present in court and to resolve the dearth of provision, the court proceeded on a novel course of action. His Lordship there opined that the court should read into O 56

certain implied provisions necessary to deal with the situation. In other words, the judge could formulate certain remedies to handle the lacuna (*Loo Chay Meng v Ong Cheng Hoe (Gamuda Sdn Bhd, Garnishee)* [1990] 1 MLJ 44; *Ho Yoke Kwei & Anor v Ong Eng Hin* [1997] 4 MLJ 292 and *Maybank Finance Bhd v Sharp Trillion (M) Sdn Bhd & Ors* Mahkamah Tinggi Melaka Guaman Sivil No 22–85, 86, 87 & 88 tahun 1997). Further, in the above case of *Permata Chartered Merchant Bank Bhd v Hiew Fook Realty (Holdings) Sdn Bhd & Ors*, the judge in no uncertain terms had said that he agreed with counsel for the plaintiff concerning the absence of any explicit provision in the Rules of the High Court 1980 allowing the reinstatement or the rehearing of an appeal from the senior assistant registrar that had been struck out by the judge in chambers. I totally agree with his view.

I now approach the alternative and/or complementary argument, ie a judge's inherent powers. The jurisdiction of a High Court judge is clearly part of the statutory jurisdiction regulated by the RHC, read together with the Courts of Judicature Act 1964, and partly an inherent jurisdiction passed down by common law, now regulated under O 92 r 4. Pursuant to these inherent powers, the relevant question to be posed is, does this power confer upon the judge that power to reinstate the material notice of appeal? In answer to this question, a discussion of some cases is necessary. I begin with the case of *Walker & Ors v Budden* (1879) 5 QBD 267. In this case the plaintiff sued the defendant for the recovery of a large sum of money. The defendant later applied to a master at chambers for liberty to defend the action and was successful, but conditional on his part to give security for a portion of the plaintiff's claim. The defendant being unhappy with this condition filed an appeal but lost out. The defendant then gave notice of motion to the Queen's Bench Division but prior to the hearing, requested the plaintiff to grant a short postponement. The plaintiff refused. Unfortunately, this refusal never reached the defendant. On the day of the hearing of that motion, the defendant's counsel did not appear in court. The plaintiff claimed the judgment of the court and the Queen's Bench Division accordingly affirmed the decision in chambers. Again, the defendant appealed and again the appeal was dismissed. Perusing the short per curiam of Cockburn CJ, Bramwell and Cotton LJJ to resolve the matter, their Lordships commented that the defendant must apply to the Queen's Bench Division which possibly in the exercise of his discretion may allow the appeal from chambers to be argued. Reading this per curiam, it would appear that the matter may be reopened for argument as at no time had the merit of the case been considered, with that order dependent upon the exercise of the discretion of the relevant division. This view was considered positively by Jessel MR in *Allum & Anor v Dickinson* (1882) 9 QBD 632. Similarly, much earlier in *Re Morris, ex p Streeter* (1881) 19 Ch D 216, the court ordered the matter before it be reheard and not subject to an appeal. In this case, the managing clerk of the appellant's solicitor had asked for an adjournment but was turned down. By some bizzare turn of events, this clerk was permitted to examine on behalf of the appellant. It was only before the end of the case that the registrar discovered that this person was not a solicitor, and therefore declined to hear further. Inspite of that discovery,

A the registrar decided on the matter and adjudged against the appellant. The matter went up on appeal. The court of appeal in a gist viewed that the act of the registrar could be interpreted and construed as if the appellant had not been heard at all. Therefore, there was a miscarriage of justice in the circumstances. A rehearing was ordered before the registrar. Again there was no appeal for consideration.

B The next stage of cases that I have in mind is sufficiently represented by the case of *Hession v Jones* [1914] 2 KB 421. Here, the plaintiff brought an action and managed to obtain judgment. The defendant appealed subsequently. By some inadvertence, the plaintiff was not present at the hearing of the appeal. Inspite of the plaintiff's absence, the divisional court C still proceeded with the appeal (*thus considered the merits of the case*) and reversed the trial judge's decision. The plaintiff applied to the King's Bench Division to reinstate and rehear the appeal, but to no avail. The basis of Bankes J and Avory J's reasoning (of same jurisdiction) were that they had no jurisdiction to rehear the matter. On a perusal of the case, it would appear that as the merits of the case had been considered, the question of D reinstatement or rehearing therefore did not arise. That would be left to the jurisdiction of the Court of Appeal.

It is therefore safe to say, for the matter at hand, a court still has the power to act and be within its jurisdiction provided it has merely struck out the case without considering the merits. That also is dependent on the court E exercising its discretion. Beyond that, its powers are limited or non-existent.

To conclude, suffice for me to opine that there was a necessity for me to formulate a remedy for the current problem. As I had dismissed the notice of appeal offhandedly, I could thereby exercise my discretion to restore the notice of appeal colloquially referred to as 'reinstatement' (*Hong Leong Finance Bhd v Robin Woon Kim Yam & Anor* Malacca High Court F Civil Suit No 22–131 of 1989; *Gan Kim Hiat & Bros Realty Sdn Bhd v Leang Ah Kan* [1983] 1 MLJ 351 per Peh Swee Chin J (as he then was)). Based on the above reasons, I granted an order in terms to encl 34 although ordered costs against the plaintiff.

Application allowed.

G

Reported by Mohd Rizal Abidin

H

I